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No. 85-2089

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

KIOWA TRIBE OF OKLAHOMA,
Petitioner,

v.

ROBERT LEWIS and DIANA LEWIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE CHEROKEE NATION; CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION OF THE YAKIMA RESERVATION, WASHINGTON (additional amici on inside cover) IN SUPPORT OF PETITIONER

Yvonne T. Knight
Native American
Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel of record
for Amici Curiae

July, 1986

52 pp

ADDITIONAL AMICI

Confederated Tribes of the Colville Reservation; Elwha Klallam Tribe; Kickapoo Tribe of Oklahoma; Kickapoo Tribe of Kansas; Lummi Tribe of the Lummi Reservation, Washington; Native Village of Fort Yukon; Nisqually Indian Community of the Nisqually Reservation, Washington; Oglala Sioux Tribe; Oneida Nation of New York; Ponca Tribe of Indians of Oklahoma; Prairie Band of Potawatomi Indians of Kansas; Quileute Tribe of the Quileute Reservation, Washington; Sauk-Suiattle Indian Tribe of Washington; Sault Ste. Marie Tribe of Chippewa Indians of Michigan; Seminole Nation of Oklahoma; Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Skokomish Indian Tribe of the Skokomish Reservation, Washington; Suquamish Indian Tribe of the Port Madison Reservation, Washington; Swinomish Indians of the Swinomish Reservation, Washington; Tohono O'odham (formerly Papago Tribe of Arizona); Walker River Paiute Tribe of the Walker River Reservation, Nevada; Wichita Indian Tribe of Oklahoma; Yankton Sioux Tribe; Association on American Indian Affairs, Inc.; National Indian Social Workers Association, Inc.; Oklahoma Indian Child Welfare Association, Inc.; Portland Area Indian Health Board; Tanana Chiefs Conference, Inc.

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MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE
OF THE CHEROKEE NATION; ET AL.

Pursuant to Rule 36.1, amici curiae consisting of twenty-six federally recognized Indian tribes, beneficiaries of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §1901 et. seq., and five Indian

Organizations involved in providing assistance to tribes and their members in obtaining the full benefits of the Act, respectfully move this Court for leave to file the attached brief amici curiae in support of the petitioner Kiowa Tribe's petition for writ of certiorari in the above-captioned case. Petitioner consents to the filing of the brief; however, respondents Robert and Diana Lewis object, and therefore, this motion is necessary.

Amici have a vital interest in the resolution of the issues raised by the petitioner in this case. If the decision of the Tenth Circuit Court of Appeals is allowed to stand, Indian tribes throughout the United States which have members residing within that Circuit's jurisdiction will be denied the right to obtain collateral

review in federal courts of state court judgments denying rights granted to tribes and their members by sections 1911, 1912, and 1913 of the ICWA. Those rights include the right to intervene in a state proceeding involving tribal members, the right under certain circumstances to have a case transfered to tribal jurisdiction, and generally the right to participate fully in the decision-making process of the state court in determining the temporary and permanent placement of Indian children who are or are eligible to be members of the intervening tribe.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition for writ of certiorari are of substantial importance because they involve the construction of a key provision of a

unique remedial statute enacted pursuant to the plenary power of Congress over Indian affairs and because they involve important considerations of federalism and comity between federal and state courts.

Amici set forth in the attached brief additional reasons for granting the petition that were not presented in the petition.

Respectfully submitted,

Yvonne T. Knight
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae

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BRIEF AMICI CURIAE OF THE CHEROKEE NATION; ET AL.

INTEREST OF AMICI CURIAE

Amici curiae are twenty-six federally recognized Indian tribes located in nine states, and five Indian Organizations committed to the advancement of the interests of Indian tribes and their members in the implementation of the ICWA. Amici Indian tribes are beneficiaries of the

Indian Child Welfare Act of 1978 (ICWA). Amici are currently and actively involved in activities implementing the ICWA. Amici are vitally concerned that the ICWA be liberally construed by courts to achieve the protective and remedial purposes of the Act which are to prevent the break up of Indian families and to ensure the continued existance of Indian tribes and Indian culture.

The decision of the Tenth Circuit in this case severely restricts the collateral review remedy afforded by 25 U.S.C. §1914 of the ICWA. The decision thus adversely affects the interests not only of Indian tribes located within the Tenth Circuit's jurisdiction, but also of those tribes located elsewhere which have tribal members residing within that Circuit's

jurisdiction. The 1980 Census shows that 1,423,043 American Indians reside within the jurisdiction of the Tenth Circuit. This is almost one-fourth of the total American Indian population in the United States.

Amici believe that the decision of the Tenth Circuit Court of Appeals in this case defeats a critical purpose of the ICWA to authorize oversight by the federal judiciary of state court compliance with certain key provisions of the ICWA deemed by Congress to warrant the special remedy of collaterial review. Amici believe that the decision denies Indian tribes and their members a remedy critical to the effectiveness of the ICWA.

The facts of this case demonstrate the need for the section 1914 remedy. The decision of the Kansas courts in this case, adopting the narrowest

possible interpretation of the scope of the ICWA, stands as a prime example of the protectionist attitude of state courts that motivated Congress to enact 25 U.S.C. §1914.

Amici concur in the arguments presented by petitioner the Kiowa Tribe and file this brief for the purpose of setting forth additional reasons in support of the petition.

SUMMARY OF ARGUMENT

1. If state rules of preclusion apply to limit the scope of 25 U.S.C. §1914 of the Indian Child Welfare Act (ICWA), that section will be rendered superfluous. It would be reduced to authorizing collateral review only in those instances where the litigant had no opportunity to be a party in the prior adjudication. However, this remedy would be available without section 1914 under the well-recognized

common law exception to res judicata. Moreover, limiting the section 1914 remedy to litigants who were not parties to the original action is contrary to the plain language of section 1914 which on its face does not admit of any limitation on its scope. Indeed, such a restricted interpretation of section 1914 conflicts with the congressional intent underlying the ICWA and with canons of statutory construction governing the interpretation of remedial statutes especially those enacted for the benefit of Indians and pursuant to Congress' trust obligations toward Indians.

2. Under 28 U.S.C. §1738, federal courts can relitigate an issue previously adjudicated by a state court to the same extent that such issue can be relitigated in the courts

of the state from which the judgment issued. The Tenth Circuit erred in determining that Kansas rules of preclusion prevented it from relitigating the question of whether the Kansas trial court violated 25 U.S.C. §1911(c) in denying the Kiowa Tribe's motion to intervene.

First, Kansas courts, by force of the Supremacy Clause, would hold that Kansas rules of preclusion are pre-empted by 25 U.S.C. §1914 because the application of such rules would defeat the purpose of 25 U.S.C. §1914 and impair Congress' plan for enforcing compliance with the Indian Child Welfare Act (ICWA). Moreover, this holding is compelled by the overriding federal and tribal interests at stake. Those interests lie in protecting Indian children from unwarranted separation from their

tribes and Indian families by state agencies unfamiliar with Indian culture, and in promoting the stability and security of Indian tribes and families. 25 U.S.C. §1914 embodies Congress' decision that these federal and tribal interests outweigh the states' interests in the finality of state court judgments.

Additionally, the ICWA establishes that decisions of state courts violative of Indian rights under 25 U.S.C. §§1911, 1912, and 1913 are void ab initio. Thus the Act preconditions state court jurisdiction to render placement decisions upon compliance with those sections. A well-recognized exception to the applicability of the doctrine of res judicata provides that the doctrine does not bar relitigation of judgments entered without jurisdiction. The

Tenth Circuit erred in failing to determine whether that exception is adopted by Kansas law.

ARGUMENT

I. THE TENTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT 25 U.S.C. §1914 DOES NOT CREATE AN EXCEPTION TO 28 U.S.C. §1738

25 U.S.C. §1914 authorizes federal courts or any "court of competent jurisdiction to invalidate" a state court action "upon a showing that such action violated any provision of sections 1911, 1912, and 1913" of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §1901 et. seq. The Tenth Circuit Court of Appeals has held in this case that 25 U.S.C. §1914 does not authorize federal courts to disregard state rules of preclusion which such courts are obligated to apply under 28 U.S.C. §1738. This decision is erroneous.

Generally, under state rules, the

doctrine of res judicata would apply to bar relitigation of issues actually adjudicated in a prior state court action to which the litigant was a party. The doctrine would also apply to bar relitigation of issues which could have been raised by the litigant in state court, but were not. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 77n.1 (1984); 18 C. Wright, A. Miller, E. Cooper; Federal Practice and Procedure §4402 (1981).

Application of the doctrine of res judicata to claims arising from sections 1911, 1912, and 1913 of the ICWA severely limits the scope of the remedy afforded by section 1914. If principles of res judicata apply notwithstanding the section 1914 remedy, any tribe, with notice of a pending state custody proceeding,

which desires to avoid a binding state court adjudication of its rights under sections 1911, 1912, and 1913 must file an action initially in federal court. Assuming the federal court does not dismiss the action for lack of a "case or controversy,"[1/] the section 1914 remedy would be rendered superfluous as to these litigants since federal adjudication would have been obtained in the first

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[1/] As to those issues where there is no indication of how a state court will rule, a federal court may find that there is no case or controversy and thus no federal jurisdiction over the case. See, e.g., Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) ("It must be a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") The litigant will thus be forced to submit those issues to the state court. The section 1914 remedy would as to such issues be superfluous.

instance.[2/] A tribe with notice of the pending state proceeding might, on the other hand, choose to await the state court judgment before filing suit in federal court; however, the tribe would risk a dismissal by the federal court based on principles of claim preclusion. Moreover the intent of the ICWA that tribes participate in the state proceeding would be defeated. And of course, any tribe that filed initially in state court would be bound by the state court judgment by operation of the doctrine of collateral estoppel.

[2/]Under the Tenth Circuit's interpretation, the section 1914 remedy can never be utilized to obtain collateral federal review of the issue of the tribe's right to intervene since that right must be asserted in the state courts before a state court judgment will be generated. Any such judgment will be binding on the tribe and not reviewable under section 1914.

Thus application of the res judicata doctrine to the section 1914 remedy would effectively restrict the availability of the remedy to those litigants who were not parties to the original state proceeding due to lack of notice, and hence had no opportunity to litigate the issues involved.

A well-recognized common law exception to the doctrine of res judicata provides:

> Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.

Allen v. McCurry, 449 U.S. 90, 101 (1980); accord, Haring v. Prosise, 462 U.S. 306, 313 (1983). Since this exception is grounded on due process concerns, both federal and state courts must, where the facts of the

case warrant application of the exception, deny a state court judgment preclusive effect. See, e.g., Allen v. McCurry, supra at 101; Haring v. Prosise, supra at 313-14; Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-83 (1982).

Interpreting section 1914 so that it affords no greater remedy than would be available under the above common law exception strips the remedy of all efficiency and conflicts with the canon of statutory construction that "[i]t cannot be presumed that the [Congress] would do a futile thing." C. Sands, 2 Sutherland Statutory Construction, §45.12 (4n. ed. 1973).

Moreover, its face, section 1914 does not incorporate state rules of preclusion as limitations upon its scope. In such an instance, this Court has stated that "[t]he plain

lanaguage of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act." Jefferson Cty. Pharm. Assn. v. Abbott Labs., 460 U.S. 150, 157 (1983).[3/]

Nothing in the legislative history of the ICWA indicates any congressional intention to burden the section 1914 remedy with state rules of preclusion. Indeed, the gravity of Congress' concern about the threat to

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[3/] If Congress had intended to so severely limit the scope of the section 1914 remedy by incorporating state rules of preclusion, it could have easily said so in the provision itself. Congress obviously considered carefully the scope of the remedy since it specifically limited its application to violations of sections 1911, 1912, and 1913 of the ICWA, omitting other important sections of the Act including that concerning adoptive placement. It is not reasonable to believe that with such precise craftsmanship, Congress intended to incorporate sub silentio the states' rules of res judicata.

the best interests of Indian children and to the very existance of Indian tribes compels the conclusion that section 1914 envinces Congress' decision that the policy of ensuring that state courts afford tribal litigants the rights granted by the ICWA is more important than affording preclusive effect to state court judgments, especially where state court are determining the existance and extent of their own federal obligations.

And finally, the Tenth Circuit's interpretation is contrary to applicable rules of statutory construction. Section 1914 is a remedial statute intended to resolve the growing problem of the alienation of Indian children from their tribes and Indian families by mandating that state courts and other state agencies

comply with specified standards and afford tribal litigants certain specified procedural rights. The rule of statutory construction applicable where remedial legislation is involved requires that any such statute "be construed broadly to effectuate its purposes." Jefferson Cty. Pharm. Assn. v. Abbott Labs., supra at 159.

Similarly, the rule that statutes enacted for the benefit of Indians must be liberally construed to carry out the statute's protective purposes argues forcefully in favor of an interpretation that 25 U.S.C. §1914 authorizes federal courts to disregard state rules of res judicata, and thus constitutes an implied exception to 28 U.S.C. §1738. See, e.g., Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

In effect, the Tenth Circuit's interpretation attributes to Congress an intent to give with one hand (25 U.S.C. §1914) while taking away with the other (25 U.S.C. §1738). This Court has said that where Indian rights are concerned, federal courts should not construe congressional acts "as a backhanded way of abrogating" federal rights granted to the Indians. Menominee Tribe v. United States, 391 U.S. 404, 412 (1968).

II. THE TENTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT KANSAS RULES OF PRECLUSION PREVENT THE TRIBE FROM RELITIGATING THE ISSUE OF THE APPLICABILITY OF THE INDIAN CHILD WELFARE ACT

In this part of the brief, amici present two arguments relevant to the second question presented by the petition for writ of certiorari as to whether the policy underlying the ICWA outweighs the policy underlying the

doctrine of res judicata and lifts any res judicata bar. Amici submit first that 25 U.S.C. §1914 codifies Congress' decision that the ICWA policy outweighs the policy of finality of judgments, and that section 1914 therefore pre-empts state rules of preclusion. Second, amici submit that Congress intended to make compliance with sections 1911, 1912, and 1913 of the ICWA a jurisdictional prerequisite to a valid state judgment, and that, under the usual exception to the res judicata doctrine, collateral attack is permitted on a judgment void for lack of jurisdiction.

A. 25 U.S.C. §1914 Pre-Empts State Rules Of Preclusion And Prevents A State From Granting Judgments Covered By §1914 Preclusive Effect In Its Own Courts

The Tenth Circuit Court of Appeals

in this case construed Kansas law to bar relitigation of the state court judgment denying the Tribe the right to intervene under 25 U.S.C. §1911(c) because the ICWA is inapplicable under the facts of the case.[1/] See Appendix A of Petition for Writ of Certiorari at App. 4-5. However, the Tenth Circuit erred because it failed to consider the interrelationship between the Indian Child Welfare Act, and in particular 25 U.S.C. §1914, and

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[1/] This Court has ruled that when federal courts are faced with the question of whether section 1738 bars relitigation of a prior state judgment, they are required first to consider whether "state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding." Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265, 4267 (1985). And "[o]nly if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to §1738 should apply." Id. at 4268.

state preclusion rules. Amici submit that the doctrine of federal pre-emption requires a finding that state rules of preclusion are preempted by 25 U.S.C. §1914. Such a finding makes it unnecessary to determine whether 28 U.S.C. §1738 is amended by implication. A state court by force of the Supremacy Clause of the United States Constitution, Article 6, §2, would be obliged to disregard state preclusion rules pre-empted by federal statute. Likewise, under 28 U.S.C. §1738, federal courts would not be required to give full faith and credit to such pre-empted state rules.

1. **The Doctrine of Federal Pre-Emption Involves A Two-Part Inquiry**

The doctrine of federal pre-emption is frequently applied in the area of federal Indian law because

Congress exercises plenary power over Indian affairs. See, generally, F. Cohen, Handbook of Federal Indian Law, 270-79 (1982 ed.).[2/]

Under the federal pre-emption doctrine:

> Indian treaties, executive orders and statutes preempt state laws that would otherwise apply by virtue of the states' residual jurisdiction over persons and property within their borders. State laws are invalidated by the exercise of a substantive Constitutional power implemented by the Supremacy Clause of the Constitution, which declares treaties and federal statutes to be "the supreme Law of the Land. . .any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2/ This "power over Indian affairs is unusual in our federal system because it includes general federal authority to legislate over health, safety, and morals . . . . [F]ederal power is "plenary," in the sense that in Indian matters Congress can exercise broad police power, rather than only the powers of a limited government with specifically enumerated powers." F. Cohen, Handbook of Federal Indian Law, supra at 219-20.

Id. at 270-71.

This Court most recently applied the doctrine of federal preemption to invalidate a state law found to be incompatible with the federal statutory scheme established by Pub. L. 280. See, Three Affiliated Tribes v. Wold Engineering, 55 U.S.L.W. 4654 (U.S. June 16, 1986) (hereinafter Three Tribes II). In Three Tribes II, the Court explained the nature of a federal preemption inquiry:

> [W]e have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

Id. at 4656.

Applying this two-part inquiry to the question of whether state rules of preclusion are pre-empted by the

Indian Child Welfare Act, and in particular by 25 U.S.C. §1914, compels the conclusion that section 1914 pre-empts state rules of preclusion which would otherwise prevent state and federal courts from relitigating issues arising from 25 U.S.C. §§1911, 1912, and 1913.

2. The Congressional Plan Behind the ICWA Would Be Frustrated By State Rules of Preclusion

With respect to the first part of the pre-emption inquiry, the congressional plan is clear from the face of 25 U.S.C. §1914. That section permits "any court of competent jurisdiction to invalidate "an action resulting in foster care placement or termination of parental rights" upon a showing that such action violated any provision of sections 1911, 1912, and

1913."[3] This language admits of no exclusions to its terms. Thus, nothing in the plain language of section 1914 excludes from its scope instances in which an issue covered by section 1914 has been previously adjudicated by a state court. In such a situation this Court has said that "[t]he plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act." Jefferson Cty. Pharm. Assn. v. Abbott Labs., supra at 157. An examination of the legislative purpose and history reveals no such contrary intent.

As petitioner has documented in the petition for writ of certiorari at

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[3]Plainly, section 1914 contemplates that not only federal courts but also state and tribal courts would be empowered to invalidate prior actions.

10-18, the legislative history of the ICWA clearly demonstrates that a principal concern of Congress was the insensitivity to Indian culture exhibited in the past by state courts and other state agencies in the placement of Indian children in foster or adoptive homes. This concern compelled Congress to impose on state courts certain standards and procedural requirements to ensure that those courts would give due consideration to preserving "the essential tribal relations of Indian people" in determining the custody of Indian children. 25 U.S.C. §1901(5); H. R. Rep. No. 95-1386 at 19, 95th Cong. 2d. Sess. (July 24, 1978).

25 U.S.C. §1914 provides a special remedy for violation by state courts of any provision of the three sections of the Act that govern those stages of

state custody proceedings concerned with foster care placement and terminations of parental rights. 25 U.S.C. §§1911, 1912, and 1913. Under section 1914, a violation of any provision of these three sections provides a basis for invalidation of the state action. Nothing in the legislative history reveals any intention by Congress to except from invalidation state court judgments which by application of state rules of preclusion would not be subject to collateral attack.

Indeed, a construction of section 1914 which excludes from its scope any issues on the ground that they were previously adjudicated in the original action is incompatible with, and impairs the general thrust of, the congressional plan to hold state courts and other agencies strictly

accountable for correcting past deficiencies that contributed to the Indian child custody crisis.

Moreover, such an interpretation of section 1914 would effectively deny that remedy to tribes and Indian litigants who chose to participate in a state custody proceeding. Such a result only operates to discourage such litigants from participating in state proceedings. This is inconsistent with Congress' intent to encourage and increase participation by tribes and Indian litigants in state proceedings for the purpose of informing the state court about tribal culture and rebutting the culturally based testimony of non-Indian social workers. As noted in the legislative history of the Act:

> In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where non exists.
>
> * * *
>
> The courts tend to rely on the testimony of social workers who often lack the training and insights necessary to measure the emotional risk the child is running at home.
>
> * * *
>
> The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.

See, H. R. Rep. No. 95-1386, supra at 10-11.

Hence, denying the section 1914 remedy to tribal litigants who choose to participate in the original state proceeding is incompatible with the purpose of the Indian Child Welfare

Act to encourage Indian participation in such proceedings.

3. Federal and Tribal Interests Outweigh State Interests

Consideration of the federal, tribal, and state interests at stake compels the conclusion that the federal and tribal interests outweigh the state interests and requires that the question of whether section 1914 pre-empts state preclusion rules be resolved in favor of tribes.

The federal and tribal interests are weighty ones: to protect the continued existence and integrity of Indian tribes which are threatened by the removal "often unwarranted" of "an alarmingly high percentage" of Indian children "by nontribal public and private agencies" and the placement of these children "in non-Indian foster and adoptive homes and institutions."

25 U.S.C. §1901(4) The legislative history of the Act is replete with statistics that clearly document the significant threat to Indian tribes by the removal of Indian children from their custody and control.

The state's interest lies in protecting the finality of judgments of its courts in child custody matters. That interest insofar as non-Indian children are concerned is not affected by 25 U.S.C. §1914. And the state's interest in the finality of state court judgments where Indian children are the subject of the custody proceeding is far outweighed by the interest of Indian tribes in protecting the continuation of their traditional ways of life by preventing the alienation of Indian children from tribal culture and people through placement in non-Indian homes and

termination of ties with the tribal culture.

The state's interest must also bow to the interest of the federal government as trustee in carrying out its longscanding responsibility to protect and preserve Indian tribes and their resources, including those children who are or are eligible to be members of tribes. By section 1914 Congress chose to strike the balance of such interests in favor of the tribal interests by authorizing the invalidation of prior state court judgments where the petitioner can show a violation of sections 1911, 1912, or 1913. Section 1914 makes no exception for actions where the claim of violation was initially asserted and adjudicated in the state proceeding.

4. Canons of Statutory Construction Support The Tribal Position

Finally, applicable rules of statutory construction argue forcefully in favor of construing section 1914 as preempting state rules of preclusion which would bar relitigation of alleged violations of sections 1911, 1912 and 1913. Any doubt or ambiguity in the interpretation of section 1914, which without question was enacted for the benefit of Indians, must be resolved in the Indians' favor. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Squire v. Capoeman, 351 U.S. 1,6-7 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Section 1914 must be liberally construed toward carrying out its

protective purposes of ensuring Indian input into state court decisions concerning custody of Indian children. Antoine v. Washington, supra, at 200; Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

In conclusion, a Kansas court would find that, by force of the Supremacy Clause of the United States Constitution, 25 U.S.C. §1914 preempts state rules of preclusion which would otherwise prevent relitigation of issues of alleged violation of provisions of 25 U.S.C. §§1911, 1912, and 1913. Hence, a Kansas state court would find that any such issues previously adjudicated in the original state action were not barred by Kansas rules of preclusion. Accordingly, 25 U.S.C. §1738 does not prevent federal courts from rehearing any such issues.

B. The Tenth Circuit Erred In Failing To Apply The Usual Exception To Res Judicata That Judgments Void For Lack Of Jurisdiction Do Not Have Preclusive Effect

The language of 25 U.S.C. §1914 coupled with the legislative history of that section demonstrate that Congress viewed compliance with 25 U.S.C. §§1911, 1912, and 1913 as a jurisdictional prerequisite to a valid state court judgment. Section 1914 by its plain terms empowers a federal court "to invalidate" a prior state action that violates "any provision of sections 1911, 1912, and 1913 . . . ." (Emphasis added.)

Congress' intent to make compliance with 25 U.S.C. §§1911, 1912, and 1913 a jurisdictional prerequisite is confirmed by the language in the original draft of the ICWA. The draft expressly

preconditioned the validity of a state court placement decision upon compliance with specified rights. The language in section 101(a) of that draft provides a typical example of the clause which proceeded specified standards and procedural safeguards: "No placement shall be valid or given any legal force and effect . . . unless . . . ."[4/] See, Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. 29-34. Section 1914 was obviously intended to provide a mechanism, i.e., collateral review, to enforce the mandate that placements violative of the Act are void and

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4/Similar clauses appear in a number of provisions of that draft preceeding statements of standards and safeguards required to be applied in the state court proceeding.

ineffective.

In this case, as part of an adoption action, the state court denied the Tribe's request to intervene which was based on 25 U.S.C. §1911(c). The court's denial was grounded on its conclusion that the ICWA was inapplicable. Thus, the question raised by that court's action is whether it violated 25 U.S.C. §1911(c). If so, by operation of the ICWA, the state court lacked jurisdiction to make the adoptive placement, and its action is void ab initio.

In Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265, 4267 (1981), this Court said:

> To the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the Court lacked jurisdiction to entertain, lower courts and commentators have

> correctly concluded that a state court judgment does not bar a subsequent . . . claim. (citation omitted)

The Court further suggested that the usual view of states is that judgments entered without jurisdiction have no preclusive effect. Id. Hence, the Tenth Circuit erred in failing to determine whether Kansas law adopts this general exception to the res judicata doctrine.

CONCLUSION

This case presents important issues of statutory construction concerning the existance and extent of federal rights granted by the Indian Child Welfare Act to Indian tribes and Indian people nationally, and concerning the extent of the obligation of federal courts under that Act to grant preclusive effect to state judgments. The importance of

these questions and their national impact warrant an early and definitive ruling by this Court. Amici Curiae respectfully submit that this Court should grant the petition for writ of certiorari.

Respectfully submitted.

Yvonne T. Knight
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel of Record for Amici Curiae

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